Supreme Court, U.S.
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No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether and, if so, in what circumstances disparate impact claims are cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34.

CORPORATE DISCLOSURE STATEMENT

Respondent Florida Power Corporation is a wholly-owned subsidiary of respondent Florida Progress Corporation, which is in turn a wholly-owned subsidiary of Progress Energy Corporation. Progress Energy Corporation has issued stock to the public, and the only publicly-held company owning more than 10% of its stock is State Street Bank and Trust Co.

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Respondents Florida Power Corporation and Florida Progress Corporation respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

INTRODUCTION

Although the lower courts are currently split over the question whether disparate impact claims are cognizable under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, the petition for a writ of certiorari in this case should be denied for three reasons.

First, and foremost, this case is not an appropriate vehicle for considering the question whether and, if so, under what circumstances disparate impact claims may be raised under the ADEA because it lacks the clear and cogent set of facts needed to facilitate this Court's analysis of that question. As Judge Barkett recognized in her separate concurrence, Pet. App. 9a, petitioners in this case failed adequately to allege valid disparate impact claims; the question whether the ADEA recognizes disparate impact claims arose in this case in the context of a class decertification motion (and not in the context of a ruling on the merits); and the question was presented on interlocutory appeal in an abstract and, for this Court's purposes, therefore unhelpful context.

Second, there is no compelling need to resolve the status of disparate impact claims under the ADEA now. The purported judicial conflict is not as substantial as the petition suggests. Moreover, because no reasoned appellate court decision has recognized disparate impact claims under the ADEA since this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), further consideration of the question by the lower courts would either resolve the conflict among them or sharpen it by provoking a reasoned defense of recognizing such claims.

Third, the decision below is correct and therefore does not require review by this Court. As courts, commentators, and Justices of this Court have recognized, *see infra* p. 12, the text

of the statute, its purposes, and history demonstrate that disparate impact claims should not be cognizable under the ADEA.

Accordingly, as it has done at least four times in the recent past, *see, e.g.*, *United Airlines, Inc. v. Frank*, 121 S. Ct. 1247 (2001); *Mullin v. Raytheon Co.*, 528 U.S. 811 (1999); *Ellis v. United Airlines, Inc.*, 517 U.S. 1245 (1996); *EEOC v. Francis W. Parker School*, 515 U.S. 1142 (1995), this Court should deny the petition and thus defer its consideration of whether and, if so, in what circumstances disparate impact claims may properly be raised under the ADEA.

STATEMENT

1. Respondent Florida Power Corporation produces, transmits, and distributes electrical power in Florida. In 1992, the company was a regulated utility with seventeen fossil fuel and one nuclear power plants, more than three dozen district or division offices, and thousands of employees spread out over a service area covering approximately two thousand miles. R.229 (Att. A ¶¶ 3-4). That year, Congress passed the Energy Policy Act of 1992, 106 Stat. 2776 (1992), with the express purpose of exposing utilities such as Florida Power to greater levels of competition. To prepare for this competition, Florida Power underwent a series of reorganizations during which more than 1,200 positions were eliminated. Pet. App. 2a; R.229 (Att. A ¶ 5).

2. Petitioners are former Florida Power employees, from throughout the Florida Power workforce, who are age 40 and over and who were terminated during the company's various reorganizations. Pet. App. 22a-23a. In 1995, fifteen of these former employees sued Florida Power and its parent, respondent Florida Progress Corporation, in the Middle District of Florida for, among other things, alleged violations of the ADEA. Through a series of six amended complaints, another forty-one petitioners were added as well as a putative class of

older employees terminated by Florida Power. Resp. App. 2a-11a. In December 1996, the District Court conditionally certified an opt-in class in an effort to facilitate settlement. Resp. App. 6a. In addition, along with several of the later joined plaintiffs, sixty or so of the individuals who opted into the class filed a suit that the District Court described as a "carbon copy" of this one. Resp. App. 8a.

3. As petitioners acknowledge, Pet. 9 n.3, the allegations in the sixth amended complaint relating to each of the plaintiffs are identical. Most of the allegations in the complaint focus upon an alleged pattern and practice of intentional age discrimination supposedly adopted by Florida Power to change the company's image and reduce its salary and pension costs. Sixth Amended Complaint ¶¶ 22-26, 31. The complaint also contains a single paragraph relating to each plaintiff purporting to allege a disparate impact claim:

> The defendants' discriminatory acts complained of in this sixth amended complaint had a disproportionate impact on older employees in that the defendants' practice or policy regarding the defendants' reduction in force had a significant adverse effect on older employees. The defendants had alternative means with a lesser discriminatory impact that could have equally well served the defendants' needs if the defendant was in fact going through a reduction in force. The defendants' reduction in force policy had a greater impact on members of the protected class than on employees under age 40.

Id. ¶ 36. The complaint does not identify the "defendants' practice or policy regarding the defendants' reduction in force" mentioned in this paragraph.

4. After settlement negotiations failed, respondents moved to decertify the class that had been conditionally certified by the District Court. Finding that the petitioners were not "similarly situated," as required for collective actions under the ADEA,

see 29 U.S.C. § 216(b); *see also id.* § 626(b) (incorporating 29 U.S.C. § 216(b) into the ADEA), the District Court granted the motion to decertify. The court found that petitioners' disparate treatment claims were dissimilar because petitioners were "terminated at different times by different decision makers based on different considerations o[r] criteria." Pet. App. 22a-23a. The court also rejected the suggestion that petitioners were "similarly situated" as a result of their disparate impact claims for the simple reason that "the disparate impact theory of liability is not applicable to ADEA claims." Pet. App. 24a.

5. Although respondents argued that petitioners' claims would be dissimilar even if they could bring disparate impact claims—because there was no general policy or practice that allegedly disparately impacted petitioners, and because any disparate impact claims would be subject to discrete defenses—the District Court found that the question whether disparate impact claims are cognizable under the ADEA was a controlling question of law. In so doing, the District Court reasoned that, because of the parallel suit involving the class members, it would have to resolve whether disparate impact claims are cognizable under the ADEA regardless of its decision on class certification. Pet. App. 29a-30a. Accordingly, the District Court certified for interlocutory appeal the question whether the ADEA recognizes disparate impact claims. Pet. App. 30a.

6. The Eleventh Circuit affirmed. Although all members of the panel recognized that the procedural posture of the case made answering the certified question a "pronouncement in the abstract," Pet. App. 2a n.1 (quotation omitted); *id.* at 9a (Barkett, J., specially concurring), the majority addressed the question and held, relying upon the reasoning of the First Circuit in *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999), and the Tenth Circuit in *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert.*

denied, 517 U.S. 1245 (1996), that disparate impact claims are not cognizable under the ADEA. Pet. App. 6a-8a.

7. Judge Barkett concurred in the panel's judgment only. Although she was of the view that the ADEA recognizes disparate impact claims, Pet. App. 9a-18a (Barkett, J., specially concurring), Judge Barkett concluded that the District Court's decertification order was nonetheless correct and that it was "unnecessary and premature to address the question whether disparate impact claims are cognizable under the ADEA." Pet. App. 9a. The pleadings, she observed, failed properly to "plead[] a disparate impact claim sufficient to qualify for class certification." *Id.* Judge Barkett also observed that it was unwise to consider the question whether the ADEA recognizes disparate impact claims because "this question does not lend itself to a pronouncement in the abstract." *Id.* She therefore concluded that it would be best to affirm the District Court's decertification order without considering the disparate impact question that the District Court had certified for interlocutory review. *Id.* & n.1.

8. Following the Eleventh Circuit's ruling, the District Court reactivated the parallel suit brought by members of the decertified class, which had been abated in light of the preliminary certification of the class. Resp. App. 11a-13a.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER AND, IF SO, IN WHAT CIRCUMSTANCES THE ADEA RECOGNIZES DISPARATE IMPACT CLAIMS

The petition asks this Court to decide whether and, if so, in what circumstances a disparate impact claim may be recognized under the ADEA. But it would not be prudent to use this case for deciding that question. As Judge Barkett recognized in her concurrence, petitioners did not properly plead a disparate impact claim in their complaint; and, because the issue arose

below in the context of a decertification ruling (rather than a ruling on the merits), the interlocutory appeal before the court below raised that question in an abstract and unhelpful context. Whether or not the majority below was correct in disregarding these concerns and deciding the certified question before it, those concerns demonstrate that this case lacks the factual base requisite for thoughtful analysis of the question presented by this Court and that this case is not an appropriate vehicle for considering, on discretionary certiorari review, whether and, if so, in what circumstances disparate impact claims are cognizable under the ADEA. Interlocutory appeals are generally not good vehicles for deciding questions on certiorari; and, in any event, this Court should decide such a question only in a case where the claim is well-pleaded and supported by a factual record that facilitates legal analysis.

First, the question whether a disparate impact claim is cognizable under the ADEA is entirely academic here, because the petitioners have failed to state a valid disparate impact claim. Because disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quotation omitted), a party asserting a disparate impact claim must "begin by identifying the specific employment practice that is challenged." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.) (plurality op.); *accord Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989): *see generally* Ramona L. Paetzold & Steven L. Wellborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* § 5.03 (1999). As Judge Barkett found in her concurrence below, petitioners have not satisfied this threshold requirement: Far from identifying a specific practice or set of practices disadvantaging them, petitioners simply allege that "defendants' practice or policy regarding the defendants' reduction in force" had a disparate impact on older employees without identifying those practices.

Sixth Amended Complaint ¶ 36. Especially where, as here, members of the protected class were "terminated at different times, by different decision makers, based on different considerations o[r] criteria," Pet. App. 22a-23a, such vague allegations are legally insufficient. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 367 (2d Cir. 1999); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 (5th Cir. 1994).

Second, this case does not present the question whether and, if so, in what circumstances disparate impact claims are cognizable under the ADEA in a helpful context for decision by this Court. Because petitioners' disparate impact allegations are conclusory, and because no facts supporting a disparate impact claim were presented in the motion to decertify below, the record underlying these allegations is undeveloped and therefore required what all members of the panel below acknowledged as a "pronouncement in the abstract." Pet. App. 2a n.1 (quotation omitted); Pet. App. 9a (Barkett, J., specially concurring). Any effort to resolve such a question on certiorari would, however, be seriously hampered by both the lack of a concrete, well-pleaded disparate impact claim and the lack of a clear and cogent set of facts serving as a base for the Court's legal analysis. *See, e.g., Secretary of State of Maryland v. Munson*, 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting) (noting that decisions based upon well developed factual records are likely to be "more sound" because "the facts of the case focus and give meaning to the otherwise abstract and amorphous issues the court must decide"). As a consequence, it would be more prudent to address the question whether disparate impact claims may lie under the ADEA in the context of a record that is adequately developed and that therefore crystallizes the issue; indeed, without such a record, the Court simply cannot sensibly determine, as petitioners request (Pet. 4, 16-17), the circumstances, if any, in which a disparate impact claim would be appropriate under the ADEA.

Third, resolving whether the ADEA recognizes disparate impact claims will not resolve this case. *See, e.g.*, *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.) (noting that this Court will "generally await final judgment . . . before exercising [its] certiorari jurisdiction"). Because the case was before the Eleventh Circuit on an interlocutory appeal from a class decertification order, the case will continue no matter how this Court rules on the cognizability of disparate impact claims under the ADEA. Indeed, because the members of the putative class have filed a parallel action, they may be able to pursue their claims no matter what happens on the decertification motion. *See supra* pp. 3, 5. Finally, it is not even clear that a ruling in the petitioners' favor would protect their opt-in class from decertification. As noted above, they have failed to allege valid disparate impact claims, and, because they were "terminated at different times by different decision makers based on different considerations o[r] criteria," Pet. App. 22a-23a, they cannot even identify a single practice disparately impacting all of them (and thus are not "similarly situated" as required by 29 U.S.C. § 216(b)). *See, e.g., Mooney v. ARAMCO Servs. Co.*, 54 F.3d 1207, 1213-15 (5th Cir. 1995) (discussing standards for determining whether parties are "similarly situated"); *see also id.* at 1213 (noting that classes are rarely certified for trial under the ADEA).

In short, this case is a poor vehicle for considering whether, and, if so, in what circumstances disparate impact claims are cognizable under the ADEA. The question arises without a record developed about the claims in this case; the complaint is without sufficient allegations to present the question; and resolution of the question would not fully or finally resolve this case.

II. THE PURPORTED CIRCUIT SPLIT IS NEITHER AS PROFOUND NOR AS SEVERE AS THE PETITION SUGGESTS

In any event, this Court would benefit from further consideration by the lower courts of the question whether the ADEA allows disparate impact claims before addressing that question itself. Although the petition suggests that "[i]t is hard to conceive of a case presenting a clearer example of conflict in the circuits," Pet. at 14, the circuit split is neither as profound nor as severe as the petition suggests. In fact, the decision below is supported by every reasoned appellate court decision on the subject; and since this Court's 1993 decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, a number of courts of appeal have reversed their prior positions in agreement with the decision below. As a consequence, there is reason to believe that the judicial conflict over whether the ADEA recognizes disparate impact claims may resolve itself through further consideration by the lower courts; and, even if the courts of appeals do not resolve the conflict themselves, further lower court consideration of the issue may provoke a thoughtful rather than reactive application of disparate impact theory under the ADEA, thereby sharpening the issue for this Court's ultimate consideration.

Since this Court's decision in *Hazen Paper Co. v. Biggins*, "there is a clear trend toward concluding that the ADEA does not support a disparate impact claim." *Ellis*, 73 F.3d at 1009. Prior to *Hazen Paper*, some lower courts had carried over disparate impact law from Title VII to the ADEA, but they did so with little analysis. *See, e.g., Geller v. Markam*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *see generally* Evan H. Pontz, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 287 (1995). After *Hazen Paper* cast doubt upon those decisions, *see* 507 U.S. at 618 (Kennedy, J., concurring) (noting that

"there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA"), a number of courts of appeals reexamined the issue and determined that disparate impact claims are not recognized under the ADEA.

For example, after close analysis of the text of the statute, its purposes and legislative history, as well as practical considerations, both the Seventh and Tenth Circuits reversed prior decisions and held that disparate impact claims are not cognizable under the ADEA. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis*, 73 F.3d at 1006-10. Engaging in a similar analysis, the First Circuit concurred, *see Mullin*, 164 F.3d at 699-704, and opinions from still other circuits have expressed support for this position. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (en banc) (DeMoss, J., concurring in part and dissenting in part) ("*Hazen Paper* indicates that disparate impact theory is not available under the ADEA."); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (expressing "considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory" in an ADEA case); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (opinion of Greenberg, J.) (same).

Following *Hazen Paper*, three circuits—the Second, the Eighth, and the Ninth—have continued to recognize disparate impact claims under the ADEA. Notably, however, none of these circuits has actually analyzed anew whether such claims are properly recognized. Instead, noting that *Hazen Paper* did not formally resolve the issue, these courts have chosen to follow their pre-*Hazen Paper* precedent without any discussion of the substance of that precedent. *See, e.g., District Council 37, AFSCME v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994); *EEOC v. Local 350,*

Plumbers and Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993). Moreover, because the cases recognizing disparate impact claims in the Second and Eighth Circuits were all resolved against the plaintiffs, the recognition of disparate impact in those circuits was actually dicta; only the Ninth Circuit has actually upheld a disparate impact claim on appeal since *Hazen Paper*. *See Frank v. United Airlines*, 216 F.3d 845, 856 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1247 (2001); *Arnett v. California Pub. Employees Retirement Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated and remanded*, 528 U.S. 111 (2000). Finally, opinions from each of the three circuits continuing to recognize disparate impact claims under the ADEA have expressed discomfort with doing so. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 n.6, 1292 n.7 (9th Cir. 2000) (noting that the circuit has "continued to *assume* that this [disparate impact] theory is still viable after *Hazen Paper*") (emphasis added), *cert. denied*, 121 S. Ct. 2592 (2001); *Smith v. Xerox Corp.*, 196 F.3d at 366 n.5 (noting that the circuit has analyzed disparate impact claims under the ADEA "without discussion"); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir. 1997) (noting that the panel was bound by prior precedent "even if we believed that *Hazen Paper* cast doubt on the validity" of that precedent). Accordingly, should these circuits reconsider whether disparate impact claims are cognizable under the ADEA, they may, like the Seventh and Tenth Circuits before them, reverse their prior positions and find that such claims are not cognizable under the ADEA.

Finally, even if the Second, Eighth, and Ninth Circuits do not reverse their current positions, further lower court consideration of the status of disparate impact claims under the ADEA may better illuminate the question whether the ADEA properly recognizes such claims. The opinions concluding that the ADEA recognizes disparate impact claims have so far failed to offer any justification for doing so beyond the similarities in some of the language of Title VII and the ADEA. The

thorough reasoning of the opinions rejecting such claims may force any future opinions adopting the contrary position to conduct a more searching analysis, which in turn may sharpen the issue and facilitate this Court's resolution of it. Thus, whether or not further future lower court decisions resolve the current conflict, this Court would benefit from further lower court consideration of the status of disparate impact claims under the ADEA.

III. THE DECISION BELOW WAS CORRECTLY DECIDED AND DOES NOT REQUIRE REVIEW BY THIS COURT

Finally, although this Court does not sit to correct errors, it is noteworthy that there was no error committed by the court below and thus there is no reason to review that court's abstract interlocutory decision. As various courts, commentators, and Justices of this Court have recognized, the ADEA does not properly recognize disparate impact claims. *See supra* p. 10 (listing cases); *accord Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of certiorari); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216-20 (7th Cir. 1987) (Easterbrook, J., dissenting); Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982); *see also Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring) (citing *Markham*, *Metz*, and Krop with favor). In addition to failing to remedy the deficiencies in the complaint and the record that make this case a poor vehicle for considering this issue, the arguments in favor of recognizing disparate impact claims under the ADEA set forth in the petition are wholly unpersuasive and, for present purposes, can be easily, and briefly, disposed of.

Petitioners initially err in contending that the "plain language" of the ADEA supports disparate impact claims because Section 623(a)(2) of the Act "imposes liability for employment practices that 'adversely' affect an employee's 'status.'" Pet. 17 (quotation omitted). As several authorities

cited by petitioners recognize, this is a "grammatically incorrect reading." *DiBiase*, 48 F.3d at 733 (opinion of Greenberg, J.); *see also* Krop, *supra*, 34 Stan. L. Rev. at 842-43 & n.27. Section 623(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a) (emphasis added). The comma after the word "employee" demonstrates that the phrase "because of such individual's age" modifies not the reference to adverse effects, but the conduct in the entire clause preceding it. As a consequence, Section 623(a)(2) prohibits the limiting, segregating, or classifying of an individual "because of that individual's age" in a way that would adversely affect the individual—that is, it prohibits disparate treatment that injures older individuals, not all conduct that disparately impacts them.

Petitioners similarly err in contending that the "reasonable factors other than age" provision in Section 623(f)(1) must be construed as an affirmative defense against disparate impact claims. Pet. 20-21. This provision is better understood to be a "definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (interpreting Title VII), just as this Court held that the "*bona fide* employee benefit plan" provision in an earlier version of Section 623(f)(2) was a definitional provision and not an affirmative defense. *See Ohio Pub. Employee Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989). Indeed, this Court has already held that a "reasonable factor" other than age is simply one that is "neutral" and "not directly dependent on age" and therefore not a pretext for discrimination. *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1988); *see also Hazen Paper*, 507 U.S. at 612-13 (suggesting that an employer may violate the ADEA by intentionally using a factor other than age as a proxy for age).

Petitioners further err in criticizing (Pet. 18) the First and Tenth Circuits for relying upon the Secretary of Labor's 1965 report to Congress on age discrimination on the ground that the report is neither dispositive nor binding. As the decision below recognized, Pet. App. 7a-8a, the report distinguishes between what are now known as disparate treatment and disparate impact by recommending that Congress bar "arbitrary age discrimination"—which it understood to be "employer policies of not hiring people over a certain age, *without consideration of a particular applicant's individual qualifications*"—but deal with neutral practices that disproportionately impact the elderly through public education, counseling, training, and other reform measures. Report of the Secretary of Labor, *The Older American Workers: Age Discrimination in Employment* 6, 11, 15 (1965) (emphasis added). Moreover, Congress incorporated this dichotomy between "arbitrary age discrimination" and practices that adversely impact the elderly directly into the statute. *See, e.g.*, 29 U.S.C. § 621(a)(2) (distinguishing between the "setting of arbitrary age limits regardless of potential for job performance" and "practices that may work to the disadvantage of older persons"); *see also id.* § 622 (authorizing education and research programs). Thus, while it may not be binding or dispositive, the Secretary of Labor's 1965 report on age discrimination provides powerful support for the Eleventh Circuit's conclusion that the ADEA does not recognize disparate impact claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES AKIN, et al.,

Plaintiffs,

CASE NO. 917-173-Civ-Oc-10C

-vs-

FLORIDA POWER CORPORATION,
and FLORIDA PROGRESS
CORPORATION,

Defendants.

WANDA L. ADAMS, et al.,

Plaintiffs,

CASE NO. 95-123-Civ-Oc-10A

-vs-

FLORIDA POWER CORPORATION,
and FLORIDA PROGRESS
CORPORATION,

Defendants.

FLORIDA POWER CORPORATION,

Defendant/Counterclaimant,

-vs-

JOE N. BRANNON, et al.,

Plaintiffs/Counterclaim Defendants.

ORDER ON PENDING MOTIONS

These cases come before the Court for deposition of several pending motions. Considerations of judicial and administrative economy and the need to expeditiously pursue a final resolution of these claims lead me to conclude that the *Akin* action should be abated and administratively closed subject to the right of the *Akin* plaintiffs to move to reopen that action should the class of plaintiffs in the *Adams* case be decertified. The Defendant's motion to dismiss *Akin* (Doc. 6) and the Plaintiffs' motion to consolidate (Doc. 12) *Akin* and *Adams* should therefore be denied. With respect to the motions pending in the *Adams* litigation, I conclude that the Defendants' motion to dismiss (Doc. 45) should be granted in part and denied in part; the Plaintiffs' motion for summary judgment (Doc. 30) on the Defendant Florida Power's counterclaim should be granted in part and denied in part; Florida Power's motion for summary judgment (Doc. 53) on the counterclaim should be granted in part and denied in part; Florida Power's motion for partial summary judgment (Doc. 167) should be granted; the Plaintiffs' motion to sever (Doc. 197) the claim of Kermit Lassiter should be granted; and the parties' joint motion to appoint a Magistrate Judge (Doc. 204) should be denied as moot.

BACKGROUND AND PROCEDURAL HISTORY[1]

Wanda Adams and fourteen other former employees of Florida Power Corporation ("Florida Power") commenced *Adams, et al. v. Florida Power Corporation, et al.*, 95-123-Civ-Oc-10A, with the filing of a complaint (Doc. 1) on July 5, 1995. The complaint alleged that Florida Power terminated the Plaintiffs' employment in connection with Florida Power's

[1] This unnecessarily lengthy and complex procedural history is, in part, the result of the Court's failure to promptly and attentively manage this case. The Court apologizes for the delay and attendant confusion.

redeployment and career transition programs that were implemented as components of a company-wide reduction in force. The Plaintiffs, all over forty years of age at the time of their respective terminations, alleged that they were targeted for discharge because of their age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. (1994). Each Plaintiff claimed an entitlement to money damages, attorneys' fees and unspecified injunctive relief.

The complaint was never served on the Defendants, and, on September 28, 1995, the Plaintiffs filed an amended complaint (Doc. 3). The amended complaint differed from its predecessor in three significant respects. First, it added two additional former Florida Power employees as plaintiffs and named Florida Progress Corporation ("Florida Progress"), Florida Power's parent company, as a defendant. Second, each of the Plaintiffs asserted a claim of age discrimination (with respect to their terminations) under the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.01, *et seq*. (1997).[2] Finally, each of the Plaintiffs claimed that they were beneficiaries under employee benefit plans administered by the Defendants and that they were discharged from employment in an attempt to prevent them from securing benefits under those plans in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1994).

[2] Because the FCRA borrows its principles of substantive liability from the ADEA, the claims under the two statutes are, on their merits, identical. *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. Dist. Ct. App. 1996). There are, however, significant differences between the two Acts with respect to the prosecution of administrative remedies, statutes of limitation and punitive damage awards. *Cf.* 29 U.S.C. § 626(c),(d),(e); Fla. Stat. § 760.11.

The amended complaint purported only to assert the claims of the several individual Plaintiffs; however, on November 30, 1995, the Plaintiffs filed a motion seeking class certification pursuant to 29 U.S.C. § 219(b) (1994) such that the Plaintiffs might represent themselves and "all others similarly situated."[3] Class certification was, of course, opposed by the Defendants (*See* Doc. 22).

Also on November 30, the Plaintiffs filed a motion (Doc. 9) seeking leave to file a second amended complaint. On March 12, 1996, after having initially stricken the motion for the Plaintiffs' failure to comply with Local Rule 3.01(g), the United States Magistrate Judge granted (Doc. 40) the Plaintiffs leave to amend.[4] The Plaintiffs filed their second amended complaint (Doc. 42) on March 19. The second amended complaint was identical to the first amended complaint in all

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[3] Class actions under the ADEA are to be distinguished from the ordinary class action commenced under Rule 23 of the Federal Rules of Civil Procedure. The ADEA adopts the procedures for certifying and prosecuting a class action established by the Fair Labor Standards Act, 29 U.S.C. § 216(b). 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 . . ., and 217 of this title . . ."). Thus, a class may be certified under the ADEA where the plaintiff employees are "similarly situated," whereas the putative class might otherwise have to meet the more stringent requirements of Rule 23(a) and (b). Additionally, while a Rule 23 class member, upon receiving notice of the action, would be required to opt out of the class in order to avoid being bound by the judgment, *see* FED. R. CIV. P. 23(c), a prospective ADEA class member must affirmatively opt into the class to be so bound. The effect of these differences on the propriety of class certification with respect to the Plaintiffs' ERISA and FCRA claims has not yet been addressed by the parties and, given the current posture of the case (*see infra* p. 9), the issue is presently moot.

[4] Rule 3.01(g), M.D. Fla. Rules, requires that a party filing a non-dispositive motion certify that it attempted to raise and resolve the issue contemplated by the motion with opposing counsel.

respects except that the new complaint also included class action allegations.

On April 8, 1996, the Defendants filed a motion to dismiss (Doc. 45) the second amended complaint as well as an answer and counterclaim (Doc. 46). The motion sought the dismissal of the Defendant Florida Progress from the action on three bases: (1) that Florida Progress is not an "employer" within the meaning of the ADEA or FCRA; (2) that Florida Progress cannot be liable under Section 510 of ERISA because it never employed any of the Plaintiffs; and (3) that the complaint fails to allege that the Plaintiffs exhausted their administrative remedies against Florida Progress. The issues raised by this motion remain ripe for decision.

The counterclaim, asserted by the Defendant Florida Power only, is lodged against five of the named Plaintiffs, each of whom executed a Career Transition Agreement and General Release prior to his separation from employment with Florida Power. The releases provided that, in exchange for monetary consideration, the counterclaim defendants agreed "not to sue or file any action and to fully release and discharge Florida Power and/or Florida Progress Corporation . . . from any and all claims, wages, causes of action, expenses, attorneys' fees, damages, judgments, and liabilities under applicable federal, state or local law. . . ." Ex. A to Florida Power's Motion for Summary Judgment on the Counterclaim (Doc. 53). The Defendant Florida Power thus alleges that these Plaintiffs are barred from bringing this lawsuit by the clear and unambiguous terms of the releases.

Florida Power had asserted this same counterclaim in its answer (Doc. 7) to the first amended complaint, and, on February 7, 1996, the Plaintiffs filed a motion for summary judgment (Doc. 30) on the counterclaim. On July 1, 1996, Florida Power filed a cross-motion for summary judgment (Doc. 53) on the counterclaim. Both motions await decision.

On August 5, 1996, the Plaintiffs' filed a motion (Doc. 57) seeking leave to file a third amended complaint (accompanied by a proposed complaint), which the Plaintiffs subsequently withdrew (Doc. 59) on August 13. On August 15, 1996, the Plaintiffs filed a motion (Doc. 60) for leave to file a fourth amended complaint (again accompanied by a proposed complaint), which the Plaintiffs again withdrew (Doc. 74) on October 2, 1996. Also on October 2, the Plaintiffs filed a motion (Doc. 75) for leave to file a fifth amended complaint (accompanied by yet another proposed complaint). The proposed fifth amended complaint sought to accomplish two ends: (1) the joinder of an additional thirty-nine former employees as plaintiffs; and (2) the withdrawal of the ERISA claims of the five plaintiffs who were the subject of Florida Power's counterclaim.

On October 16, 1996, while the motion for leave to amend was pending before the Magistrate Judge, the Court set this case for a status conference and hearing on all pending motions for October 29, 1996. At that status conference, the parties agreed to attempt an amicable resolution of the claims of all of the former employees and, toward this end, requested that the Court conditionally certify the case as a class action. Accordingly, on December 11, 1996, the Court entered an order (Doc. 84) certifying a class of plaintiffs under the ADEA and 29 U.S.C § 216(b). The order defined the class as all former employees of Florida Power who were terminated from employment on or after July 1, 1993 as a part of the redeployment or career transition programs and who were forty years of age or older at the time of their respective terminations. The order established a procedure for providing notice to potential class members and permitting them to opt into the lawsuit. *See supra* n.3. The order did not purport to make a final ruling that the case would proceed to trial as a class action, but instead reserved that decision for a hearing to be held on the Defendants' motion at the conclusion of

discovery.[5] Finally, the order provided that ruling on all other pending motions would be reserved until the time for opting into the class expired.

On January 8, 1997, the Court, anticipating that the opt-in period would expire sometime prior to mid-April, scheduled a status conference for April 22, 1997. As of April 22, sixty-three former employees of Florida Power had opted into the class. When combined with the seventeen original Plaintiffs and the thirty-nine potential plaintiffs who were the subject of the Plaintiffs motion for leave to amend, only two of whom had opted in as class members, the *Adams* action involved one hundred and seventeen former employees.

At the status conference conducted on April 22, the parties represented to the Court that they wanted to mediate and/or arbitrate the case before any judicial resolution of the substantive issues was attempted. In accordance with the parties' expressed wishes, the Court entered an order (Doc. 152), on April 24, 1997, holding any further proceedings in abatement and deferring ruling on all motions pending the outcome of the parties settlement efforts or the expiration of ninety days, whichever came first. On May 8, 1997, the Court entered an order (Doc. 153) referring this case to mediation.

On May 16, 1997, the Defendants filed a motion (Doc. 154) alleging that the parties' settlement efforts had failed and requesting that the Court conduct a status conference. The Court scheduled a status conference for June 27, 1997 which was, on the Plaintiffs' motion (Doc. 158), continued until July 17, 1997.

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[5] The December 11 order did not identify a specific procedural vehicle through which the propriety of class action status could be reached. However, the notice mailed to potential class members, and incorporated into the December 11 order, makes clear that the class would remain certified unless and until the Defendants filed (and the Court granted) a motion to decertify the class.

Meanwhile, on June 6, 1997, *Akin, et al. v. Florida Power Corporation, et al.*, 97-173-Civ-Oc-10C, was initiated with the filing of a complaint (Doc. 1). The *Akin* plaintiffs (ninety-eight of them) are comprised of thirty-seven of the thirty-nine individuals sought to be joined in the *Adams* fifth amended complaint and sixty-one of the sixty-three individuals who had opted into the *Adams* plaintiff class. Each of the *Akin* plaintiffs asserts ADEA, FCRA and ERISA claims against Florida Power and Florida Progress arising out of their separation from employment. All counsel of record in *Akin* are also counsel of record in *Adams*. In short, the *Akin* lawsuit is a carbon copy of the *Adams* action minus the seventeen original *Adams* plaintiffs.

On July 14, 1997, the Defendants filed a motion to dismiss (Doc. 6) the *Akin* complaint arguing that judicial economy requires dismissal because the *Adams* case embraces the same issues on a class-wide basis. Florida Progress also argues, as it does in *Adams*, that it should be dismissed because it never "employed" any of the Plaintiffs.

The Court conducted the previously scheduled status conference in the *Adams* case on July 17, 1997. The parties represented to the Court that their attempts at alternative dispute resolution had failed. Accordingly, on July 18, 1997, the Court entered an order (Doc. 161) vacating the April 24 order of abatement, reviving all pending motions and directing the parties to confer and file a case management report within thirty days.

On July 31, 1997, the *Akin* plaintiffs filed a motion to consolidate (Doc. 12) their case with *Adams* pursuant to FED. R. CIV. P. 42(a) claiming that the substantial similarity between the two actions warrants their concurrent prosecution and consideration.

In view of the revival of the pending motions in *Adams*, on August 13, 1997 the Magistrate Judge, concluding that the

Plaintiffs' motion did not adequately explain the need for further amendment, entered an order (Doc. 164) denying the Plaintiffs' motion for leave to file a fifth amended complaint without prejudice to the filing of a properly supported motion seeking such relief.

On August 26, 1997, the Defendants filed a motion for summary judgment (Doc. 167) on the ADEA claims of four of the *Adams* plaintiffs. The Defendants argue that these claims are barred by the respective plaintiffs' failure to commence a civil action within ninety days of receiving a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). *See* 29 U.S.C. § 626(e). The Plaintiffs have responded to the motion and it remains for consideration.

On August 28, 1997, the *Adams* plaintiffs filed a motion for leave to file a sixth amended complaint accompanied by another proposed amended complaint. In this motion, the *Adams* plaintiffs sought the joinder, as named plaintiffs, of the thirty-nine individuals from the proposed fifth amended complaint *and* sixty-one of the sixty-three individuals who had opted into the class. The proposed sixth amended complaint also deleted the ERISA claims of the five counterclaim defendants. On November 21, 1997, the Magistrate Judge entered an order (Doc. 194) granting the motion with respect to the thirty-nine plaintiffs involved in the earlier motion, but denying the motion with respect to the sixty-one opt-in class members. The order gave the Plaintiffs ten days in which to file an amended complaint effectuating the Magistrate Judge's decision, but no such pleading was ever filed.

As previously noted, the December 11 certification order left open the possibility that the class could, on the Defendants' motion, be decertified. *See supra* n.7 and accompanying text. The Defendants have not filed any motion seeking decertification, however, and the *Adams* case presently proceeds as a class action.

The Court conducted a status conference in both *Akin* and *Adams* on May 13, 1998. After that conference, the Court, on May 20, 1998, entered an order (Doc. 210) directing the parties to file their respective discovery plans and to suggest how common issues of fact and law in *Adams* and *Akin* might be grouped for efficient resolution. The parties have made their respective submissions.

DISCUSSION

These cases, in their current posture, present two sets of issues requiring discussion. First, the Court must determine how the relationship between *Akin* and *Adams* effects the future course of each of those cases—an inquiry which requires disposition of the Defendants' motion to dismiss *Akin* and the Plaintiffs' motion to consolidate *Akin* and *Adams*. Second, the Court must decide the substantive issues raised by the pending motions in *Adams*.

A. Relationship Between Akin and Adams

1. The Procedural Posture of *Adams*

The *Adams* plaintiffs did not file a sixth amended complaint within the time provided by the Magistriate Judge's November 11 order. When asked about the status of the issue pleadings at the May 13 status conference, counsel for the Plaintiffs represented that he believed that the *submission* of a proposed complaint with the motion for leave to amend sufficed as the *filing* of such a document. The filing of an additional lengthy complaint conforming to the requirements of the Magistrate Judge's order, counsel thought, would serve only to further thicken an already voluminous file.

While the Plaintiffs clearly did not comply with the order of the Magistrate Judge, the parties have since litigated the action as though the authorized amendments had been made. Moreover, the Court is convinced that the joinder of the additional plaintiffs facilitates the expedient resolution of both

the *Akin* and *Adams* cases. *See infra* pp.11a-13a. Accordingly, the Court will direct that the Plaintiffs' proposed sixth amended complaint be filed *nunc pro tunc* to the date of the Magistrate Judge's order granting leave to amend.[6] The Court will remove from its consideration of that document the individual claims of the sixty-one former employees who opted into the plaintiff class and as to whom the Magistrate Judge denied leave to amend.[7]

2. The Motions to Dismiss *Akin* and to Consolidate *Akin* and *Adams*

The *Akin* plaintiffs consist of the thirty-nine plaintiffs added by the sixth amended *Adams* complaint and sixty-one of the sixty-three opt-in *Adams* class members (the two additional class members having become named plaintiffs in the sixth amended complaint); thus, there is no *Akin* plaintiff who is not now represented—either as a named plaintiff or a class member—in the *Adams* case. Assuming that the *Adams* class

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[6] As illustrated here, the substitution of counsel's own judgment for compliance with the literal terms of a court order will, at best, result in unnecessary confusion and wasted judicial labor. The Court admonishes counsel to avoid doing so in the future.

[7] Thus, the sixth amended complaint, as modified by this order, asserts the individual or representative claims of the following former employees: Wanda Adams, James Akin, Linda Baldwin, Philip Bassa, Larry Bayes, James Beck, Cheryl Becker, Gary Becker, Cynthia Behrens-Boga, Richard L. Boreman, Linda Boyle, Gerald Brannen, Joe N. Brannon, Donald Breeden, Lorin Bryan, Robert Bunch, Thomas Catlett, Jr., Earl Doby, Samuel Dupuy, Paul Fintak, Leo Floyd, Gregg Frangipane, Jack Fremgen, John Gallagher, Mickey Gauldin, Polly Gillespie, Ralph Graves, Thomas Hays, Gopal Hedge, David Hodgson, Wiliam E. Hoover, Douglas Janowski, William Kenefik, Kermit Lassiter, Gloria Maxwell, Richard Merriman, James Moock, Michael Moore, Thomas Neaman, Jr., William Passmore, James M. Pennington, Marcia Quinn, David Reed, Joe Ried, Randy Seifert, Jiri Skala, James C. Smith, Janet Smith, William A. Smith, G. Allen Suban, William Sullivan, Steve Twitty, Charles Wagoner, Wendy Wheeler, Carl Williams and Barry Wood.

remains certified, the claims of all of the *Akin* and *Adams* plaintiffs are susceptible of resolution in a single case.

The Defendants argue, in their motion to dismiss (Doc. 6), that the Court should exercise its discretion and dismiss the *Akin* complaint because *Adams* was filed first. *See West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) (holding that a court may, in its discretion, and in order to avoid duplicative labor and interference with the authority of another court, dismiss a lawsuit when the issues are presented in an action previously filed in another federal court). The authority cited by the Defendants is inapposite, however, because the two cases at issue here are not pending in different courts. Indeed, the cases are not only pending in the same court, but are also before the same judge. Thus, this is not a case in which the prosecution of the second action would impede a sister court's ability to decide a case; rather, the pendency of the two actions here implicates only the efficient administration of the Court's own docket.

Moreover, the dismissal of *Akin* seems particularly inappropriate because the issue of the continued certification of the *Adams* plaintiff class is not yet finally resolved. Should the Court order the dismissal of *Akin* and then, on the Defendants' motion, decertify the *Adams* plaintiff class, sixty-one plaintiffs—the *Adams* opt-ins who are also named plaintiffs in *Akin*—would go completely unrepresented in the present litigation. These Plaintiffs would likely seek further amendment of the *Adams* complaint or institute yet another separate legal action, needlessly increasing costs in time and efficiency for both the parties and the Court. The motion to dismiss should be denied.[8]

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[8] To the extent the motion to dismiss argues that Florida Progress Corporation is not liable on the merits of the Plaintiffs' claims, it is mooted by the Court's decision to abate *Akin* altogether.

Consolidation of *Akin* and *Adams*, although within the Court's discretion, is also inappropriate. *See Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1168 (11th Cir. 1995) (holding that decision to consolidate under FED. R. CIV. P. 42(a) is committed to discretion of the district court). Unless the *Adams* class is decertified, all of the *Akin* plaintiffs will remain represented in that case. Consolidating *Akin* and *Adams* so that *Akin* may continue to be litigated as a separate action simply serves no purpose and would only increase the administrative burden involved in deciding the Plaintiffs' claims.

All of the Plaintiffs' claims are most efficiently resolved by simply abating *Akin* and directing that the file be closed. If *Adams* remains a class action, any further litigation of *Akin* will be unnecessary. If, on the other hand, the Defendants obtain decertification of the *Adams* class, the *Akin* plaintiffs may move to reopen the case and allow the claims of the Plaintiffs not represented in *Adams* to be decided. Because the resolution of the *Adams* class certification issue takes on increased importance to the timely resolution of these claims, the Defendants, if they intend to do so, should file a motion to decertify the *Adams* class within thirty days.

B. The Pending Motions in Adams

1. Florida Progress Corporation's Motion to Dismiss

Florida Progress has moved (Doc. 45) to dismiss the *Adams* complaint.[9] In support of dismissal, Florida Progress argues

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[9] The motion to dismiss was filed in response to the second amended complaint; however, the *nunc pro tunc* filing of the sixth amended complaint does not render the motion moot. In all relevant respects, the sixth amended complaint makes the same substantive allegations as the second amended complaint, and requiring the refiling of the motion to dismiss would serve only to delay the resolution of the substantive issues raised by the motion.

that all of the Plaintiffs were employed exclusively by Florida Power, its wholly owned subsidiary, and therefore that Florida Progress cannot be considered an "employer" under the ADEA or FCRA and cannot be held liable under Section 510 of ERISA. Florida Progress also contends, with respect to the ADEA and FCRA claims, that the Plaintiffs have failed to adequately allege that they have exhausted their administrative remedies against it. Finally, Florida Progress urges that the ERISA claims should be dismissed because the Plaintiffs have failed entirely to allege that they have exhausted the procedures for reviewing their claims under the subject employee benefit plans.

In passing on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court is mindful that "[d]ismissal of a claim on the basis of barebones pleadings is a precarious disposition with a high mortality rate." *Int'l Erectors, Inc. v. Wilhoit Steel Erectors Rental Serv.*, 400 F.2d 465, 471 (5th Cir. 1978). A complaint need only give the Defendant and the Court fair notice of the claim being asserted and should not be dismissed unless it "appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2L.Ed. 2d 80 (1957). *See* also *Cook & Nichol, Inc. v. The Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971). A complaint is sufficiently pleaded "if it shows that the Plaintiff is entitled to *any* relief that the Court can grant, regardless of whether it asks for the proper relief." *Dotschay v. Nat. Mut. Ins. Co.*, 246 F.2d 221, 222 (5th Cir. 1957).

a. the ADEA and FCRA claims

Florida Progress contends that it cannot be considered an "employer" within the meaning of the ADEA or FCRA, and that the Court thus lacks subject matter jurisdiction over these claims. *See* 29 U.S.C. §§ 623(a), 630(b); Fla. Stat. §§ 760.01(7), 760.10(1). Specifically, Florida Progress argues

that Florida Power alone hired, employed and discharged each of the Plaintiffs. In support of this claim, Florida Progress has submitted affidavits of several of the Defendants' executives tending to show that Florida Power, although wholly owned by Florida Progress, was legally distinct from Florida Progress and that it maintained exclusive control over its personnel policies.

The question of whether Florida Progress is an "employer" within the meaning of the statutes goes to the existence of jurisdiction over the subject matter of the Plaintiffs' claims. *See generally Sosa v. Airport Sys., Inc.*, 133 F.3d 1417 (11th Cir. 1998). The question also directly implicates the substantive merits of the Plaintiffs' claims; thus, a motion arguing that a defendant is not an "employer" should be decided under the standards applicable to Rule 12(b)(6) motions to dismiss or Rule 56 motions for summary judgment, as appropriate, and not the less stringent standard supplied by Rule 12(b)(1). *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1263-64 (11th Cir. 1997). As the discovery taken thus far has been very limited,[10] the Court is disinclined to treat Florida Progress' motion as a motion for summary judgment and consider its evidence and will evaluate the motion under the standard applicable to Rule 12(b)(6) motions to dismiss. *See* FED. R. CIV. P. 12(b); *Jones v. Auto Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1531 (11th Cir. 1990) (holding that decision to treat motion to dismiss as motion for summary judgment rests in the discretion of the district court).

The sixth amended complaint alleges that "Florida Progress Corporation is the parent company of defendants [sic] Florida Power Corporation and has direct authority and managing

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[10] The Plaintiffs' proposed discovery plan (Doc. 212) reveals that they have not yet deposed any of the Defendants' executives or officers and that the Defendants have interposed objections to the bulk of the Plaintiffs' interrogatories and requests for production.

control over Florida Power Corporation." Sixth Amended Complaint at ¶ 13. While perhaps not as precise as it could be, the complaint is clearly sufficient to put Florida Progress on notice that the Plaintiffs claim that it and Florida Power should be treated as a single employer with respect to the decision to terminate the Plaintiffs' employment—i.e., that the Defendants' operations are so interrelated and centralized that they should be treated as a single entity. *See McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 725-26 (N.D. Ala. 1981), *aff'd*, 664 F.2d 295 (11th Cir. 1981). While the evidence may ultimately support Florida Progress' claim that it is not an "employer," the allegations of the complaint are sufficient to survive the present motion to dismiss.

Florida Progress also argues that the Plaintiffs failed to name it as a respondent in any timely charge of discrimination filed with the EEOC and that they are thus barred from asserting their age discrimination claims under the ADEA and FCRA. *See* 29 U.S.C. § 626(e); Fla. Stat. § 760.11. Florida Progress concedes, however, that a defendant that was not named in a charge of discrimination may nonetheless be made a party to a subsequent civil action if the defendant named in the charge (in this case, Florida Power) and the unnamed defendant are sufficiently interrelated, or if the unnamed defendant was actually aware of the administrative proceedings. *See* Florida Progress' Memorandum in Support (Doc. 6) of Motion to Dismiss at 10-11. Given the Court's conclusion that the sixth amended complaint adequately alleges a "single employer" theory, the Court is also inclined to conclude that the complaint adequately pleads that the Defendants are so interrelated that filing a charge against Florida Power was, in effect, the same thing as filing a charge against Florida Progress. Moreover, these same allegations also permit the inference that Florida Progress was aware that charges of discrimination had been filed against Florida Power. The motion to dismiss, to the extent it applies to the

Plaintiffs' federal and state age discrimination claims, should be denied.

b. the ERISA claims

Florida Progress also argues that the complaint fails to allege that the Plaintiffs exhausted their administrative remedies under the employee benefit plans with which they claim the Defendants wrongfully interfered. Indeed, the sixth amended complaint alleges that "this claim is brought under Section 510 of ERISA, 29 U.S.C. § 1140, therefore, exhaustion of administrative remedies is not required." In response to the motion to dismiss, the Plaintiffs argue that ERISA's exhaustion requirement does not apply where, as here, the claimed violation is a violation of the statute as distinguished from the employee benefit plan. *See Amaro v. Cont'l Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984); *Janowski v. Int'l Bhd. of Teamsters Local 710 Pension Fund*, 673 F.2d 931 (7th Cir. 1982), *vacated in part*, 433 U.S. 1222, 103 S. Ct. 2565, 77 L. Ed.2d 1406 (1983).

The Plaintiffs' position is directly contrary to the law of the Eleventh Circuit Court of Appeals which has held that an ERISA plaintiff must exhaust the administrative remedies created by an employee benefit plan, regardless of whether the claim is based on the plan or on the statute, prior to bringing a civil suit in federal court. *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985).[11] The Court, in its discretion, may decline to enforce the exhaustion requirement

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[11] The Court is troubled by the fact that *Mason*, which states the controlling law of this circuit and is directly adverse to the Plaintiffs' position, was decided some ten years prior to the filing of the Plaintiffs' memorandum in response to the motion to dismiss and is not so much as mentioned (much less discussed or distinguished) by the Plaintiffs. Perhaps more disturbing is the fact that *Mason* actually disapproves the approach taken by *Amaro*, a Ninth Circuit case cited as authority for the contrary proposition in the Plaintiffs' memorandum.

when the pursuit of administrative remedies would be futile or where the remedies themselves are inadequate. *Springer v. Wal-Mart Assoc. Group Health Plan*, 908 F.2d 897, 899 (11th Cir. 1990); *Curry v. Contract Fabricators Incorporated Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990). The Plaintiffs make no such allegations, however, and it would be an abuse of the Court's discretion to decline to enforce the exhaustion requirement for no reason at all. The motion to dismiss, insofar as it pertains to the ERISA claims, should be granted.[12]

2. The Cross-Motions for Summary Judgment on the Counterclaim

As previously discussed, five of the named Plaintiffs entered into Career Transition Agreements and General Releases with the Defendants, prior to their separation from employment, through which they waived their rights to pursue any legal claims flowing from their respective terminations in exchange for a contractually specified monetary sum. In its counterclaim, Florida Power seeks enforcement of the waiver of suit provisions of the agreements executed by the Plaintiffs Brannon, Catlett, Gauldin, Janowski and Pennington at the time of their respective terminations. Both the Plaintiffs and Florida Power have filed motions for summary judgment with respect to the counterclaim.[13] At issue in the motions is the

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[12] Because the Court has concluded that the ERISA claims should be dismissed for failure to exhaust administrative remedies, it need not, at present, consider Florida Progress' claim that it is not a proper Defendant to a proceeding under 29 U.S.C. § 1140.

[13] In view of the filing of the second amended complaint and second counterclaim, the Plaintiffs' motion for summary judgment had been terminated as moot from the Court's automated docketing system and is not presently listed as one of the motions pending in this case. As the second counterclaim is identical to its forerunner, requiring the filing of a second summary judgment motion would be an empty exercise in formality.

effect of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f) (1994), on the enforceability of the releases.

The entry of summary judgment is appropriate only when the Court is satisfied that "there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The Court must examine all of the evidence and draw all inferences in favor of the non-moving party. *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). Because the issue presented by the cross-motions involves questions of contract construction, matters of law for the Court's determination, that principle applies somewhat differently. Where the issue is to be ultimately resolved by the Court instead of a jury, the Court may resolve disputed issues of ultimate fact so long as the operative facts—i.e., those facts from which the ultimate fact of legal consequence is to be inferred—are undisputed. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978).

The OWBPA requires that employee waivers of rights or claims under the ADEA be knowing and voluntary. 29 U.S.C. § 626(f)(1). The statute provides that waivers of rights and claims under the ADEA are not knowing and voluntary unless they comply with a number of explicit prerequisites.[14] 29 U.S.C. § 626(f)(1)(A)-(H). In adopting the OWBPA, the Congress elected to impose a set of specific and unqualified duties on employers seeking to obtain waivers of ADEA

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[14] The statutory list is not exclusive, however; waivers may be in compliance with the specific requirements of the OWBPA and nonetheless not be knowing and voluntary if, for instance, they are procured by fraud, duress or coercion, or if they are the product of a mutual mistake of fact. *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373-74 (11th Cir. 1995).

rights, and the statute is thus to be strictly construed. *See Oubre v. Entergy Operations. Inc.*,—U.S.—,118 S.Ct. 838, 841 (1998) ("The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word . . . Congress delineated these duties with precision and without qualification . . ."). A claim that a plaintiff has released his rights under the ADEA is an affirmative defense, and a defendant seeking to enforce such a release thus bears the burden of proving that the release complies with the provisions of the Act. *See* FED. R. CIV. P. 8(c); S.Rep. 101-263, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1540.

The Plaintiffs argue, among other things, that the Career Transition Agreement and Release violates the statutory requirement that the employee be "advised in writing to consult with an attorney prior to executing the agreement." 29 U.S.C. § 626(f)(1)(E). Florida Power counters that the following understanding, expressed in each of the subject Plaintiffs' agreements, is sufficient to satisfy the statute: "You agree that you have had an opportunity to carefully read and review this Agreement and discuss it with your advisor. . . ." Citing to Webster's New Universal Unabridged Dictionary, which defines an advisor as "one who gives advice; as, a legal advisor," Florida Power argues that the use of the term "advisor" in the release clearly contemplates a legal advisor or attorney and that the release thus comports with the OWBPA.

The Court is inclined to disagree. The release simply does not comply with the literal requirements of the statute, which mandates that the employee be *advised* to confer with an *attorney* prior to signing the agreement. Initially, the release at issue here does not advise, caution, or recommend that the Plaintiffs do anything; it merely expresses the understanding that the employee had the opportunity to speak to an advisor if he or she was inclined to do so. *American Airlines. Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 118 (1st Cir. 1998)

(holding that release stating that employee had "reasonable and sufficient time and opportunity to consult with an independent legal representative" prior to executing release did not constitute "advice" within the meaning of 29 U.S.C. § 626(f)(1)(E)).

Moreover, while the Defendant is correct that the term "advisor" might be understood to refer to one who gives legal advice, the term also clearly refers to a larger class of individuals who frequently "give advice," e.g., parents, friends or clergy. In requiring that employees considering waiving rights or claims under the ADEA be advised to consult with an attorney, Congress intended to give the employee the ability to "assess, *with the assistance of counsel,* the viability of a potential ADEA claim." *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1033, 140 L. Ed.2d 201 (1998) (dicta) (*emphasis added*). *See also* S.Rep. 101-263, at 32, 34, *reprinted in,* 1990 U.S.C.C.A.N. 1509, 1538, 1540. In short, Congress appears to have contemplated that employees be advised to seek legal advice concerning the potential merits of an ADEA claim so that the employee can understand what he or she surrenders in releasing those claims. In view of this intention, the Court must conclude that Congress meant what it said when it chose the word "attorney" and that the release's reference to an "advisor" fails to satisfy the statute.

Construing the statute to accept the *post hoc* recitation that the employee had an opportunity to seek some form of advice prior to signing the release is inconsistent with the unambiguous language of the statute, and the Plaintiffs' motion for summary judgment, insofar as it pertains to the ADEA claims, should be granted).[15]

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[15] Florida Power has withdrawn its claim that the Plaintiffs should be required to "tender-back" the monetary consideration given in exchange for the release in light of *Oubre v. Entergy Operations. Inc.*, __U.S.__,

Florida Power is, however, entitled to summary judgment insofar as the releases apply to the Plaintiffs' claims under the FCRA.[16] The OWBPA does not apply to the FCRA, and the release clearly purports to bar claims asserted under that statute. The Plaintiffs make no argument to the contrary. Under Florida law, the Court must give the unambiguous language of the releases their operative effect and grant Florida Power's motion for summary judgment insofar as they pertain to the FCRA claims. *Cerniglia v. Cerniglia*, 679 So. 2d 1160, 1164 (Fla. 1996). *See Neill v. Gulf Stream Coach, Inc.*, 966 F. Supp. 1149, 1151 & n.4 (M.D. Fla. 1997) (noting that the command of *Erie R.R. Co. v. Thompkins*, 301 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), applies to state law claim brought within federal court's jurisdiction by the presence of a federal claim in the action).

3. Florida Power's Motion for Partial Summary Judgment

On August 26, 1997, Florida Power moved for summary judgment on the ADEA claims of Linda Boyle, Tom Engers, Linda Maraget and James Owens arguing that those claims are barred by the Plaintiffs' failure to file suit within ninety days of receiving a notice of right to sue from the EEOC.[17] *See* 29 U.S.C. § 626(e). There is no dispute that each of these

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118 S.Ct. 838 , 139 L. Ed. 2d 849 (1998)

[16] The sixth amended complaint deleted these Plaintiffs' ERISA claims, and the parties' arguments with respect to those claims are therefore moot.

[17] Tom Engers, Linda Maraget and James Owens each opted into the *Adams* class and were thus parties to the action at the time the summary judgment motion was filed. Linda Boyle, however, was not joined in this action until the Court directed the filing of the sixth amended complaint. However, requiring the filing of an additional summary judgment motion would simply promote form over substance; the Plaintiffs and Florida Power litigated the motion as though Ms. Boyle was, in fact, a party.

individuals failed to file suit, seek joinder in this action or opt into the plaintiff class within ninety days of receiving their respective right to sue letters from the EEOC, and Florida Power would thus appear to have established a threshold entitlement to summary judgment. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392 (11th Cir. 1998) (holding that, in ADEA class action, statute of limitations tolls upon opting into putative class). The Plaintiffs argue, however, that the Court should excuse their failure to timely commence suit and allow them to "piggyback" on the timely filed claims of the representative plaintiffs.

The Plaintiffs' argument is devoid of merit. The so-called single-filing rule permits an ADEA claimant who failed to file a timely charge of discrimination with the EEOC (as distinguished from a timely filed civil action) to "piggyback" on the timely filed charge of one of the named plaintiffs in a subsequent class action lawsuit in certain circumstances. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1101-1102 (11th Cir. 1996), *cert. denied solo nom.*, __ U.S. __, 177 S. Ct. 435, 136 L.Ed.2d 342 (1996). *See* 29 U.S.C. § 626(d) (requiring timely filing of charge of discrimination with EEOC). The rationale behind the rule is that the timely filing of a charge of discrimination that is representative of several other similar claims with the EEOC is sufficient to put the employer on notice of the complaint and thus to avoid the exclusion of "otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the 'useless act of filing a charge.'" *Grayson*, 79 F.3d at 1103 (quoting LARSON, EMPLOYMENT DISCRIMINATION § 102.35(b) at 21-276.29—21-276.30)). The justification for a piggybacking rule disappears with the filing of a charge of discrimination with the EEOC, which triggers that body's investigatory and conciliatory procedures and thereby defines the scope of a potential plaintiff's complaint; thus, the Eleventh Circuit has held that the single-filing rule will not permit a plaintiff to avoid the ninety day statute of limitations by seeking to "piggyback" on

a timely filed lawsuit. *Gitlitz v. Compagnie Nationale Air France*. 129 F.3d 554, 558 (11th Cir. 1997).

The Plaintiffs' argument is clearly foreclosed by controlling precedent. As there is no dispute that the Plaintiffs either joined or opted into this action after the expiration of the ninety day limitations period, the Defendant is entitled to summary judgment.

Accordingly, upon due consideration, it is ORDERED that:

(1) with respect to *Akin, et al. v. Florida Power Corporation. et al.*, 97-173-Civ-Oc-10C:

(a) the Defendants' motion to dismiss the complaint (Doc. 6) is DENIED.

(b) The Plaintiffs' motion to consolidate (Doc. 12) is DENIED.

(c) This action is ABATED. The Clerk is directed to administratively close the file subject to the right of either party to move to reopen the action should the *Adams* class be decertified, or for other good cause shown.

(2) With respect to *Adams, et al. v. Florida Power Corporation, et al.*, 95-123a-Civ-Oc-10C:

(a) the Clerk is directed to file the Plaintiffs' proposed sixth amended complaint as the Plaintiffs' sixth amended complaint *nunc pro tunc* to November 21, 1997. The Court will not consider the individual or representative claims of the sixty-one individuals who opted into the conditionally certified class and as to whom the Magistrate Judge denied leave to amend, but will consider those claims only insofar as those individuals remain members of the Plaintiff class.

(b) Florida Progress Corporation's motion to dismiss (Doc. 45) is GRANTED IN PART and all of the ERISA claims alleged in the sixth amended complaint are DISMISSED without prejudice. The Plaintiffs shall have **ten**

(10) days from the date of this order in which to reallege their ERISA claims by filing an amendment to the sixth amended complaint; the filing of an entirely new complaint is not necessary. If the Plaintiffs decide to file such an amendment, they may only allege the ERISA claims dismissed by this order; no additional parties may be joined and no additional claims may be alleged. The Defendants shall move or answer any amendment filed by the Plaintiffs within **ten (10) days of service** with any such amendment. In all other respects, the motion to dismiss (Doc. 45) is DENIED.

(c) The Plaintiffs' motion for summary judgment (Doc. 30) on Florida Power Corporation's counterclaim is GRANTED IN PART and the Plaintiffs are entitled to judgment on the counterclaim with respect to the ADEA claims of Joe Brannon, Thomas Catlett, Jr., Mickey Gauldin, Douglas Janowski and James Pennington. The Clerk is directed to withhold the entry of judgment pending resolution of the case as a whole. FED. R. CIV. P. 54(b). In all other respects, the Plaintiffs' motion for summary judgment (Doc. 30) on the counterclaim is DENIED.

(d) Florida Power Corporation's motion for summary judgment (Doc. 53) on the counterclaim is GRANTED IN PART and Florida Power is entitled to judgment on the counterclaim with respect to the FCRA claims of Joe Brannon, Thomas Catlett, Jr., Mickey Gauldin, Douglas Janowski and James Pennington. The Clerk is directed to withhold the entry of judgment pending resolution of the case as a whole. FED. R. CIV. P. 54(b). In all other respects, the Florida Power Corporation's motion for summary judgment (Doc. 53) on the counterclaim is DENIED.

(e) Florida Power Corporation's motion for summary judgment (Doc. 167) on the ADEA claims of Linda Boyle, Tom Engers, Linda Maraget and James Owens is GRANTED. The Clerk is directed to withhold the entry of judgment

pending resolution of the case as a whole. FED. R. CIV. P. 54(b).

(f) For the reasons stated in the motion, and in the absence of any objection by the Defendants, the Plaintiffs' motion to sever (Doc. 197) the claim of Kermit Lassiter is GRANTED and Mr. Lassiter's claims will be tried separately from those of the other Plaintiffs.

(g) The parties' joint motion to appoint a Magistrate Judge (Doc. 204) is DENIED AS MOOT in view of the general order of reference which directs the assignment of discovery motions to the Magistrate Judge as a matter of course.

(h) The Defendants are directed to file any motion to decertify the class they deem necessary **within thirty (30) days of the date of this order**.

(i) The Clerk is directed to refer any future motions to amend the complaint, answer or counterclaim to the District Judge for decision.

DONE and ORDERED at Jacksonville, Florida, this 19th day of June, 1998.

/s/
UNITED STATES DISTRICT JUDGE

Copy to counsel of record
Copy to Hon. Howard T. Snyder